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CASE NO. 96-1665

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

LYDIA SANTIAGO, as personal representative of the Estate of Jaime Santiago,
Petitioner,

v.

KATHLEEN WARE, WAYNE MIXDORF, TODD ZANGL, and DENNIS DANNER,
Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Wisconsin

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PETITIONER'S REPLY BRIEF TO BRIEF IN OPPOSITION

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INTRODUCTION

In *Young v. Harper*, Case No. 95-1598, the Court held that inmates have a liberty interest directly under the due process clause of the 14th Amendment in a pre-parole

conditional release program. The decision addressed virtually the identical questions presented in this case, making it appropriate for the Court to summarily reverse the Wisconsin Court of Appeals. The court of appeals mistakenly relied on *Sandin v. Conner*, ___ U.S. ___, 115 S. Ct. 2293 (1995) in holding that there was no liberty interest in continuation in the Wisconsin Community Residential Confinement (CRC) program. In the petition (prepared prior to the Court's decision), the petitioner argued that *Young* might control. Once *Young* was decided, the petitioner prepared a supplemental brief to specifically address the implications of *Young*.

In their response to the petition for certiorari, the respondents did not try to distinguish *Young* or argue that *Young* did not essentially invalidate the decision of the Wisconsin Court of Appeals on the liberty interest issue. Indeed, the respondents did not even cite or refer to *Young* anywhere in their response. Instead, they essentially requested denial of the petition on two grounds: first, they argued that the liberty interest issue in effect is mooted by threshold issues that were correctly decided by the Wisconsin Court of Appeals, and second that the resolution of the issues turn on factual disputes.

Contrary to the respondents' arguments, not only is the liberty interest issue independent of the other two issues raised in the petitioner's questions presented, but the implications of *Young* suggest that the random and unauthorized defense is inapplicable to this case. Moreover, the factual issues that the respondents attempt to make material, are issues on which the trial court made findings of fact in the petitioner's favor and that the Wisconsin Court of Appeals left undisturbed.

SUPPLEMENTAL BACKGROUND

The trial court found that the respondents Zangl and Danner violated several of Santiago's due process rights, including his right to a due process hearing, and his right to be convicted based on some evidence on both the charge of disruptive conduct and the charge of violating institution policies and procedures. The Wisconsin Court of Appeals first held that Santiago had a liberty interest in not having his mandatory release date extended, but not in his removal from the CRC program. Petition for Writ of Certiorari and Appendix, ("App."), pp. 13a-21a. The court then held that by failing to include claims in an administrative appeal, Santiago waived all of his due process claims, except for his claims that his convictions violated the "some evidence" rule of *Superintendent Massachusetts Correctional Institution v. Hill*, 472 U.S. 445 (1985). *Id.*, p. 21a and 21a n.15. The court agreed that the defendants' violated the some evidence rule on the policies and procedures charge but not on the disruptive conduct charge. *Id.*, p. 30a. Finally, the court held that the random and unauthorized doctrine insulated the defendants from liability for violating Santiago's right to be convicted on the basis of some evidence on the charge of violating institution policies and procedures. *Id.*, p. 36a. In doing so, the court concluded that Santiago had an adequate state remedy for the extension of his mandatory release date. *Id.*, p. 37a. Since it had already rejected Santiago's argument that his removal from the CRC program implicated a liberty interest, the court did not decide whether there was an adequate state remedy for that removal.

A judge who concurred in the majority opinion by the court of appeals believed that an institutional rehearing cured the due process deprivations and also eliminated any claims Santiago had based on the due process violations. *Id.*, pp. 43a-45a. At the conclusion of the July 20, 1992 disciplinary hearing, respondent Zangl recommended that Santiago be removed from the CRC program. The program review committee (PRC) subsequently formally removed him from the program. Having been removed from the program, Santiago remained at Waupun, rather than in a community setting. In September 1992, Santiago filed this lawsuit in circuit court in Dane County, Wisconsin. Some time later, respondent Danner ordered that an internal rehearing be held. At the February 1993 rehearing, Santiago was found not guilty of violating policies and procedures, but guilty of disruptive conduct. The circuit court believed that the guilty finding at the rehearing was constitutionally defective. *Id.*, p. 70a.

ARGUMENT

I. EACH QUESTION PRESENTED IS CONSEQUENTIAL REGARDLESS OF THE RESOLUTION BY THE COURT OF OTHER QUESTIONS OR WHETHER THE OTHER QUESTIONS ARE EVEN ADDRESSED.

The respondents do not address the merits of the questions the petitioner identified in the petition. In particular, the respondents completely ignore the fundamental issue of whether *Young v. Harper* mandates due process hearings before Wisconsin inmates may be removed from the CRC program. Instead, the respondents suggest that the resolution of that issue (by a decision of this Court, by a summary reversal, or by a

remand for reconsideration in light of *Young*) would be inconsequential to this case. Specifically, the respondents contend that "to succeed on his CRC liberty interest theory, petitioner must first succeed on his Random and Unauthorized issue [and] ... to get to that issue, he must first overcome his waiver of due process issues by failing to raise them in the first place. Response to Petition for Writ of Certiorari, p. 2.

The respondents are wrong. The Wisconsin Court of Appeals held that Santiago did not waive claims based on the "some evidence" standard. Regardless of this Court's actions on the waiver or exhaustion issue, the question of whether there is a liberty interest in the CRC program remains a viable issue on the "some evidence" due process claims. While the court of appeals concluded that the random and unauthorized test disposed of the "some evidence" claims, it did not reach the question of whether the test applies to the deprivation of the loss of CRC status. Accordingly, the court did not decide whether there was an adequate state remedy for the loss of CRC status – a necessary remedy before a claim can be barred by the random and unauthorized doctrine. Again, regardless of this Court's actions on the random and unauthorized question, the liberty interest issue will remain viable. Moreover, in light of *Young*, it is unlikely that there is an adequate state remedy to the substantial loss of CRC placement.

As the Wisconsin Supreme Court has noted, an inmate grievance system and state certiorari review provide inmates who have suffered limited deprivations adequate post-deprivation remedies. *Irby v. Macht*, 184 Wis. 2d 831, 850-51, 522 N.W.2d 9 (1994). It is unlikely that any court would conclude, based on the trial court's findings of fact, that Santiago suffered only "limited deprivations."

The respondents argue that the February 1993 rehearing eliminated Santiago's sec. 1983 claim completely. At most, however, the rehearing would have affected the amount of Santiago's damages, not the availability of sec. 1983 relief in the first place. Santiago's damages flowing from removal from the CRC program began well before February 1993 - either from the time of Zangl's recommendation for removal from the CRC program or from the PRC's formal action removing him from the program. Not only were there damages to the plaintiff from his removal from the program, he was also awarded damages for the violation of his due process rights at the July 20, 1992 hearing. App., pp. 26a and 71a. Finally, the trial court found that the rehearing was constitutionally deficient. *Id.*, p. 70a.

II. THE UNDISPUTED FACTS AS FOUND BY THE TRIAL COURT AND LEFT UNDISTURBED ON APPEAL ESTABLISH CLAIMS FOR RELIEF UNDER 42 U.S.C. § 1983.

The respondents argue in their response brief that their actions cannot as a matter of law create liability under sec. 1983 because they were not involved in the decision to remove Santiago from his nursing home placement, and they were not members of the program review committee that removed Santiago from the CRC placement. The respondents have no support for this argument in the decisions of either the trial court of the Wisconsin Court of Appeals. Santiago's claim has always been that the respondents violated his constitutional rights because their actions under color of state law caused his removal - not from a particular nursing home or a particular placement - but from the CRC program itself.

The respondents' attempt to create and then hide behind the shield of the PRC is also unavailing. The trial court found that the respondents' actions caused the plaintiff's removal from the CRC program:

> 22. As a direct result of the findings of guilt and the disposition referring plaintiff to the PRC, his security classification was changed from minimum to maximum, he was terminated from CRC., and held at WCI until June 30, 1993. Although, a PRC review would have occurred based on plaintiff's discharge from the nursing home, the PRC review that did occur was as a result of the hearing before defendant Zangl and the results were based upon the findings made by defendant Zangl and confirmed by defendant Danner.

App. 65a.

> 28. If Mr., Santiago had gone before the PRC because of discharge from Plymouth Manor but without two major rule violations on his record it is unlikely that his security classification would have changed. He would therefore have been eligible to continue on CRC and to be placed in another nursing home (which he was on June 30, 1993) or to reside in the home of one of a number of relatives, which his sister, Lydia Santiago, as well as Mr. Santiago, himself, testified he could, as a practical matter, have done.

App. 67a-68a (footnote omitted). The Wisconsin Court of Appeals did not disturb those findings.

III. ALL OF THE QUESTIONS PRESENTED ARE APPROPRIATE FOR COURT REVIEW, FOR SUMMARY REVERSAL, OR FOR REMAND IN LIGHT OF SUPREME COURT CASES.

In light of *Young*, there is little doubt that the Wisconsin Court of Appeals erred in its analysis of whether Santiago had a liberty interest in continued placement in the CRC program. It should not have resolved the issue based on *Sandin*, at least until it had determined whether Santiago had a liberty interest under the due process clause under the principles of *Wolff v. McDonnell*, 418 U.S. 539 (1974). The respondents did not dispute this in their response brief; instead, they completely ignored it. They argue, however, that the issue is moot because Santiago loses anyway on the waiver and random and unauthorized issues, and because the facts preclude section 1983 liability against these respondents. As discussed above, the respondents' arguments are unpersuasive. Since the liberty interest issue is consequential and *Young* directly affects the issue, this Court's actions should assure that the principles of *Young* are considered in this case.

As argued in the Petition, the random and unauthorized issue by itself is worthy of Court review. It raises the question of whether a hearing examiner's erroneous conclusion that an inmate is guilty of a violation is more like the loss of a hobby kit or the decision to admit a patient to a mental hospital. *See Parratt v. Taylor*, 451 U.S. 527 (1981) *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986); and

Zinermon v. Burch, 494 U.S. 113 (1990). The respondents do not discuss the merits of that question in their response brief.

Finally, for the reasons stated in the Petition, the waiver issue is appropriate for Court review. Indeed, it may also be appropriate for summary reversal. The novel waiver doctrine created by the Wisconsin Court of Appeals finds no support in federal law or in Wisconsin Supreme Court interpretations of federal law. The court of appeals' waiver doctrine directly conflicts with the principles of *Felder v. Casey*, 487 U.S. 131 (1988). Contrary to the respondents' argument in their brief, just a little common sense distinguishes this case from cases in which inmates do not participate at all in disciplinary hearings. Here, Santiago fully participated in the hearing and then appealed under institution appeal procedures. Regardless of whether the appeal raised every potential violation of his constitutional rights, he did not waive his right under 42 U.S.C. 1983 to seek redress in court.

CONCLUSION

The petitioner respectfully requests that the Court grant the petition for certiorari, summarily dispose of the petition on its merits, or remand the case to the Wisconsin Court of Appeals for reconsideration.

Respectfully submitted,

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